No. 12,620

IN THE

United States Court of Appeals

For the Ninth Circuit

ALFRED V. GOO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

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OPINION BELOW.

The memorandum order of the District Court denying appellant's motion to withdraw his plea of guilty is reported in 10, Federal Rules Decisions at page 333 and also appears on pages 18-29 of the record.

JURISDICTION.

Section 3231 of Title 18, United States Code, confers jurisdiction upon the Court below; and this Court has jurisdiction under Sections 1291 and 1294 of Title 28, United States Code.

STATEMENT OF THE CASE.

The history of this case has been accurately related by the Honorable J. Frank McLaughlin, Judge, United States District Court for the District of Hawaii, in his memorandum ruling denying the appellant's motion to change his plea. That ruling, which was recorded in 10, Federal Rules Decisions at page 333, and appears in the record on pages 18-29, is quoted herein with the addition of references to pertinent portions of the record, as the appellee's statement of the case (the appellant is referred to as the defendant throughout the ruling):

(Title of District Court and Cause.)

MEMORANDUM RULING UPON MOTION FOR CHANGE OF PLEA, RULE 32, F.R.CR.P.

On February 9, 1950, the defendant, represented by two attorneys, Harry Hewitt, Esq., and John Alexander, Esq., of the firm of Hewitt & Alexander, appeared in Court, and when the Government announced its desire to file three felony charges against the defendant in the form of an information (R. 39) the defendant waived his constitutional right and consented to the filing of the charges in that form (R. 39, 40).

Immediately thereafter defense counsel informed the Court that the defendant waived reading of the information, and was ready to plead (R. 40). As will appear infra, the defendant and his attorneys had had for some time in advance a copy of the information (R. 144). Thereupon the defendant arose and when asked by the presiding judge regarding his plea as to each count,

the defendant replied as to each count that he was guilty (R. 40).

The three pleas were recorded and the defendant adjudged guilty on each charge (R. 32, 40).

The Court then called upon the Government for a statement of the facts, after which it gave the defendant an opportunity to be heard. Through his attorney, the defendant stated he had no excuses or explanations to offer. The defendant himself remained silent (R. 41-55).

A pre-sentence investigation was ordered by the Court, the due date of which was set as February 20, 1950 (R. 53). At the same time the Court stated that the defendant might do well to consider during the interval the matter of discharging his civil liability (R. 52-53). The Court admonished the defendant, however, that it should be recognized that this judge usually sent tax dodgers to prison (R. 47) and that payment of the taxes and penalties on the civil side was not to be taken as an assurance that the defendant would not be sentenced to prison (R. 52, 53). The defense represented that it would, pending the arrival of the date set for sentence, look into the civil tax aspects of the case (R. 55).

Within a few days, the defendant in person, without either of his attorneys, appeared in this Judge's chambers desirous of seeing the Judge about his case. His request was refused. Still a bit later the Court received a telephone call from a friend who had been requested to see if he could intercede in the defendant's behalf. The Court refused to listen (R. 57).

Within a day or so the defendant discharged his attorneys, and they were excused by the Court.

The Court was then notified that Attorney Peter Lee and Attorney Garner Anthony, of the firm of Robertson, Castle & Anthony, would enter appearances for the defendant, and the Court consented to the new attorneys' assuming the responsibility for defendant's presence in Court on the date scheduled for sentence (R. 7-8).

On that date, February 20, 1950, the new attorneys appeared in Court with the defendant and requested (1) that the defendant be allowed to withdrew his pleas and (2) that since the attorneys had only recently been called into the case, time to check into the matter of the defendant's civil liability (R. 55). The first request was denied (R. 60), while the second was granted to March 13, 1950 (R. 59), and the prior admonition of the Court as to its customary type of sentence in a tax case was repeated (R. 57).

Before the arrival of the new date for sentence, the defendant, acting through his attorney, Alfred L. Castle, represented that it was essential that more time be granted as the civil liability question required that the defendant employ an accountant to make an audit, especially since the Government had lost some of defendant's canceled checks. The United States Attorney consenting, more time was granted to March 27, 1950 (R. 16).

Near the expiration of this third period of time to consider payment of the civil liability, Attorneys Anthony and Lee represented that there had been turned up a $23,000 carry back item of loss which might result in there being no tax for the years 1946 and possibly 1945 and 1944, but that the Government would not accept it; hence more time was again needed. Having from the outset

directed the Government to cooperate with the defendant if he was disposed to settle his civil liability, the Court stated it would grant more time if the Government agreed. Assistant United States Attorney Ingman, acting in the absence of Assistant Hoddick who handled the case, said he would confer with the Internal Revenue people and report. This he did, reporting that there was no sense to granting still more time, and its reasons relating to the $23,000 matter, and others, would gladly be recited at a conference with defendant's counsel.

The Court directed that defendant's counsel Anthony be telephoned and notified of the Government's report. This was done by Assistant United States Attorney Richardson, to whom Mr. Anthony abruptly stated that there was no point to a conference to hear the Government's reasons, and that therefore he would proceed to file a motion.

The motion turned out to be the one now under consideration, a motion to withdraw the pleas of guilty and to plead anew as not guilty. The motion was accompanied by an affidavit of the defendant, Attorney Castle, the defendant's accountant, and Attorney Anthony (R. 9-15).

The date for hearing the motion was twice changed for cause, first at the Government's request and then at Attorney Anthony's request.

Finally, the motion came on for hearing on May 16 (R. 61).

Though on February 20 an oral motion of like nature had been denied (R. 60), the proportions of this formal motion dictated that the matter be considered again.

The defendant first argued that under Rule 32, Federal Rules of Criminal Procedure, the motion must be granted as a matter of right. This the Court denied, holding that disposition of the matter rested in the area of judicial discretion. United States v. Searle, 180 F. 2d 209 (C.C.A. 7, 1950). See generally Taylor v. United States, 179 F. 2d 640 (C.C.A. 9, 1950), and especially the second petition for rehearing, No. 12,453 decided May 23, 1950, by the United States Court of Appeals for the Ninth Circuit.

Next it was contended the four affidavits should move the Court to grant the motion.

The Court pointed out that the only relevant affidavit was the defendant's, and that stated only conclusions. A recess was taken to allow the defendant to decide if he wished to submit evidence in support of his factual conclusions (R. 78, 79).

After the recess the defendant took the witness stand. He testified on direct examination that he had employed Hewitt & Alexander after receiving a letter from the Department of Justice. This he said was but a few days before pleading on February 9 (R. 81, 82). He further said that he talked to Hewitt several times about his plea and the amount of the tax stated in the information (this, of course, was before it was filed in Court), and that Hewitt told him, "* * * I am guilty even if I owed them $1, I am guilty just the same, so it is best to plead guilty;" (R. 82) that Hewitt never talked to defendant's bookkeeper, nor did he recommend hiring an accountant, and made no investigation prior to the date defendant plead guilty (R. 83, 95). The defendant said he had never been in Court before; that Hewitt said the information stated all the taxes he owed—but

after the plea said he owed more than that (civil liability) (R. 84). Goo said Hewitt advised him to plead guilty, as he said, "I have no other alternative but plead guilty" and that if he argued about entering "a plea" the Court, "* * * he says he put me a long-term sentence * * * the best for me to do is keep my mouth shut, not to say anything." (R. 85, 87). The defendant added that after plea, his accountants had discovered errors made by the United States, especially a $23,000 item of which he was ignorant when he plead guilty; that Hewitt said that could be taken up with the Internal Revenue (R. 85, 86). Goo restated that he plead guilty because "Mr. Hewitt told me to plead guilty in this case." (R. 87). When asked the basis of his "fear, ignorance and confusion" stated in his affidavit, Goo said, "Well, according to my attorney told me that it is best for me to plead guilty rather than saying anything at all. If I do, why I going to be sentenced to a long-term prison." So he decided to follow his advice (R. 87).

Upon cross-examination Goo admitted that he received the Department of Justice tax letter in January, employed Hewitt & Alexander (R. 88) and took advantage January 19 of the hearing which the Government offered (R. 92-93). At the administrative hearing, defendant and his counsel were present, were given an opportunity to examine Goo's records which were in the Government's custody, and did so, the invitation to inspect them being one which continued even after the hearing (R. 95, 143, 159, 160, 169). When asked if after the administrative hearing and at a conference in the United States Attorney's office Hewitt had not explained to Goo the difference between crim-

inal and civil tax liability, and if he did not recall the Government then and there telling him his civil liability was between thirty-five and forty thousand dollars, the defendant testified, "No, I don't. * * * I don't remember that, but I asked, * * * 'Is that all the amount owing in the affidavit?,' he say 'Yes, it is plainly written there' " (R. 97). He again denied remembering being told by the Government the amount of his civil liability (R. 97). Asked if his "fear" did arise after he heard the Court's statement after he had plead guilty, Goo said—twice breaking into the question, "Before that. * * * Before that. * * * No, the fear was before that when Attorney Hewitt told me best for me to plead guilty. I told him, 'That is not the amount I am owing, $7,400 or $7,500. He told me even if I am owing one dollar, I am guilty just the same, so it is best not to argue about it, that is, to keep my mouth shut' " (R. 98). Goo also denied remembering a second conference with his attorneys and Government counsel before the information was filed, at which again civil liability was distinguished from criminal, and he further denied remembering that at said conference his assets were listed to see if he could pay his civil liability (R. 98, 99). Goo claimed such occurred after his pleas, and after he discharged Hewitt & Alexander and employed new attorneys.

The defense thereupon rested, and the Government called in opposition subpoenaed witness Attorney Harry Hewitt. The defendant promptly claimed that Attorney Hewitt could not testify because the defendant claimed the attorney-client privilege and had not waived it by himself testifying (R. 103-131).

The Government, relying upon Hunt v. Blackburn, 128 U.S. 464 (1888), submitted (1) that the defendant waived his privilege by filing the motion charging his former attorneys with unprofessional conduct, and (2) clearly by testifying.

After due consideration of the tense point, the Court, citing Cooper v. United States, 5 F. 2d 824 (C.C.A. 6, 1925), ruled (1) it was not satisfied that the defendant's affidavit explicitly or clearly charged Hewitt and Alexander with unprofessional conduct, but (2) he did so in his testimony and (3) had also waived the privilege by putting in issue the exact nature of his former attorney's advice (R. 130, 131).

Accordingly, holding that the defendant by his testimony had waived his privilege, the Court allowed Hewitt to testify as to, and only as to, the advice he had given the defendant, excluding any facts coming to his knowledge from the defendant under the attorney-client relationship (R. 131, 138).

Attorney Hewitt testified that he had practiced law for thirty years, had had some tax law experience, and had been hired by Goo when the defendant received the Department of Justice letter in January, that an administrative hearing with the tax officials was had, with the defendant and his bookkeeper present, and they had an opportunity to examine defendant's books (R. 140-142). Hewitt testified that after the hearing, at Hewitt's office, with Attorney Alexander present, he said to Goo, "Alfred, how are you going to explain all of that?," whereupon the defendant threw up his hands and said, "It is no use. I

might as well give up." Hewitt stated he then asked the defendant, "Do you mean plead guilty?," to which Goo said, "Yes." (R. 143, 144). That occurred January 20, and at no time thereafter did Goo indicate that he had changed his mind about what he should do; indeed, "it never was discussed again, that is, in the way of any doubt in his mind as to what he should do." (R. 144). Hewitt stated that the Government gave him an advance copy of the information on February 6, which he at once gave to Goo, who asked to take it overnight and to discuss it with his bookkeeper; that when Goo brought it back he was asked if he had any complaint as to it, or if he had any defense to it, to which he said, "No." (R. 144). Hewitt also testified that prior to plea there was a discussion of Goo's civil liability, that Goo when told at the conference that it was thirty-five to forty thousand dollars did object that it couldn't be so high and that then and there Hewitt broke it down for him into tax and penalty and interest for the three years involved, and that Goo's assets were counted up to see if he could pay the civil bill (R. 147, 148). Hewitt denied ever telling Goo that if he argued about pleading he would get a long sentence (R. 148).

Upon cross-examination Hewitt was not examined as to his direct testimony, but an endeavor was made to reveal that Hewitt talked to the Government about this motion, before its hearing, without Goo having released him from the bond of the client's privilege. Hewitt took the position that the affidavits annexed to the motion charged him with unprofessional conduct, and hence the

mere filing of such by Goo was a waiver of the privilege (R. 150-155).

A similar situation arose when subpoenaed witness Alexander was called to testify. The Court ruled the same way, and Alexander also testified (R. 157). Although an endeavor was made by way of argument to claim Alexander contradicted Hewitt, the argument finds no support in the record unless one purposely chooses to ignore the time factor or the substance of the testimony of each. Alexander was asked by Government counsel if he or Hewitt recommended to the defendant that he should enter a plea of guilty. Alexander answered, "We did, but if I may— * * * The circumstances were made after we had on several occasions attempted to elicit from the defendant an explanation of certain matters which appeared to us to be extremely condemning and extremely serious and he had refused, or failed to produce the names of witnesses or any evidence which would enable us to defend him on charges." (R. 161.) Asked if the defendant said anything about pleading, Alexander said, "I don't recall his exact statement at any time, other than I do recall his saying some words to the effect of: Well, what is the use? Or words to that effect." (R. 161.) Alexander also denied ever telling Goo to keep his mouth shut else he might go to prison for a long term, and in sum clearly described the situation as had Hewitt, especially as to Goo's knowing the difference between his criminal and civil tax liability (R. 162, 163).

William J. Doherty of the Internal Revenue Intelligence Unit testified corroborating Hewitt and Alexander as to details of the administrative

hearing and conferences attended by the defendant (R. 167-173).

The defendant presented no rebuttal.

Thereupon the parties argued the motion. During the argument the Court pointed out to defense counsel that the motion would have at least "smelled sweeter" if defendant had not endeavored to talk to the Court (supra) or had not had a person try to intercede with the Judge for him (supra) (R. 186).

At the end of the argument, passing over much that might have been said, the Court announced its ruling that the defendant had provided no basis upon which the Court could exercise its discretion in favor of the motion; therefore it was denied. June 1 was set for sentence, and the matter of the civil liability referred to again in the same language as had been used twice before—save that June 1 was fixed as the final date (R. 193-195).

In addition to the discrepancies in the appellant's testimony noted by the District Court, this Court's attention is called to the fact that when queried by his attorney as to whether he understood the difference between criminal and civil liability, the appellant said "No". Immediately afterward, when asked by the attorney for the government if he understood the difference between criminal and civil liability, the appellant said "Yes, I understand now."

It is further to be noted that the appellant was in no way induced by promises of leniency to enter a plea of guilty (R. 148) nor has the appellant alleged that any such promise was made.

Judgment and sentence were entered in this matter on June 1, 1950. Appellant was sentenced on each of the three counts contained in the indictment to pay a fine of $1,000.00, plus costs, and was committed to the custody of the Attorney General for periods of 2 years as to Count I, 2 years as to Count II and 2 years as to Count III, Counts II and III to run concurrently (R. 30, 31, 196).

SUMMARY OF ARGUMENT.

Two questions have been presented by the appellant in this appeal:

1. Under Rule 32(d) of the Rules of Criminal Prodecure for the District Courts of the United States, can a defendant withdraw a plea of guilty before sentence, as a matter of right?

2. In the instant case did the District Court abuse its discretion by denying the appellant's motion to withdraw his plea of guilty?

It is respectfully submitted that the answer to each of these questions is "No".

ARGUMENT.

I. DEFENDANT IS NOT ENTITLED TO WITHDRAW HIS PLEA OF GUILTY PRIOR TO SENTENCE AS A MATTER OF RIGHT.

The Act of March 8, 1934, Ch. 49, 48 Stat. 399, which authorized the Supreme Court of the United States to prescribe rules of criminal procedure for the Dis-

trict Courts of the United States provided in part as follows:

> That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States: *Provided,* That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

Pursuant to the provisions of the Act of March 8, 1934, the Supreme Court prescribed rules of criminal procedure for the District Courts of the United States which are found at 292 U.S. 661. Rule II(4) provided that:

> A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.

This rule remained in effect until March 21, 1946, the effective date of the new Federal Rules of Criminal Procedure for the District Courts of the United States.

The courts uniformly held that a motion to withdraw a plea of guilty, brought under Rule 11(4), was addressed to the sound discretion of the Court. *United States v. Denniston,* 89 F.(2d) 696 (1937—2 C.C.A.) certiorari denied 301 U.S. 709; *Farnsworth v. Zerbst,* 98 F.(2d) 541, 543 (1938—5 C.C.A.); *Ward v. United States,* 116 F.(2d) 135 (1940—6 C.C.A.); *United States v. Fox,* 130 F.(2d) 56 (1942—8 C.C.A.) certiorari denied 317 U.S. 666; *Farrington v. King,* 128 F.(2d) 785, 787 (1942—8 C.C.A.); *United States v. Colonna,* 142 F.(2d) 210, 211 (1944—3 C.C.A.); *Bergen v. United States,* 145 F.(2d) 181, 186 (1944—8 C.C.A.); *Swift v. United States,* 148 F.(2d) 361, 362 (1945—App. D.C.); *United States v. Mignogno,* 157 F.(2d) 839 (1946—2 C.C.A.). certiorari denied 330 U.S. 830.

As pointed out by the Appellant in his brief, pages 6 and 7, the requirement under Rule 11(4) that a motion to withdraw a plea of guilty had to be made within certain time, was given jurisdictional effect by the courts. *Cooke v. Swope,* 109 F.(2d) 955 (1940—9 C.C.A.); *United States v. Achtner,* 144 F.(2d) 49 (1944—2 C.C.A.). It is apparent that Rule 11(4) could frequently result in severe injustice to a defendant, particularly when newly discovered evidence was turned up after the defendant had been sentenced, or more than ten days after he had entered his plea. Having given the time limit set forth in the rule jurisdictional weight, a court could not entertain a motion to withdraw the plea if not timely filed and there was some doubt as to whether such a

situation could be remedied by the filing of a petition for a writ of error *coram nobis*. In this connection see *United States v. Norstrand Corporation et al.,* 168 F.(2d) 481, 482 (1948—2 C.C.A.). Comments on the harshness of the old rule, directed primarily to the fact that the rule deprived a Court of jurisdiction to correct a manifest injustice unless that injustice were called to the attention of the Court within the period of time specified in the rule, are found in the following cases and articles: *United States v. Achtner,* supra, page 52; *Swift v. United States,* supra, page 362; *Von Moltke v. Gillies,* 161 F. (2d) 113, 116 (1947—6 C.C.A.) rev'd 332 U.S. 708; *"Improving Procedure on Judgment and Appeal in Federal Criminal Cases,"* Lester B. Orfield, 2 F.R.D. 573, 577 (1942); *Federal Rules of Criminal Procedure with Notes and Proceedings,* New York University School of Law, 1946, p. 227.

Congress in the Act of June 29, 1940, Chapter 445, 54 Stat. 688, 18 U.S.C. Sec. 687, authorized the Supreme Court of the United States to prescribe rules of criminal procedure for the District Courts of the United States. The proviso contained in the Act of March 8, 1934, " . . . that nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed" was omitted from the Act of June 29, 1940. In Rule 32(d) of the new Federal Rules of Criminal Procedure, which became effective on March 21, 1946, it is provided that:

> A motion to withdraw a plea of guilty of or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

The Appellant has endeavored to work out through a comparison of Rule 11(4) of the old Rules of Criminal Procedure and Rule 32(d) of the New Rules of Criminal Procedure a tortuous theory that under Rule 32(d) a defendant may withdraw a plea of guilty as a matter of right at any time prior to sentence (Appellant's Brief, p. 8, et seq.). To do this, he refers to the following quotation from an address given by Professor Lester B. Orfield on August 25, 1942, 2 F.R.D. 573, 577:

> * * * The present Rule 11(4) provides that a motion to withdraw a plea of guilty must be made within ten days after entry of such plea. Is not this an undue hardship on the defendant, and should we not adopt the rule now prevalent in many states which permits withdrawal of the plea at any time before sentence?

The following note accompanies that statement and query:

> Sec. 230 of the American Law Institute Code of Criminal Procedure (1930) goes even further and permits setting aside of a judgment so that the plea may be withdrawn.

The Appellant points out that several courts had commented upon the harshness of Rule 11(4) and

noted that the Advisory Committee on Rules of Criminal Procedure, of which Professor Orfield was a member, had recommended a substantially more liberal rule. The Appellee does not contend that Rule 32(d) is not more liberal than the old rule, II(4), but it is apparent that the increased liberality extends only to the time within which a defendant may apply for leave to withdraw his guilty plea and does not deprive the Court of its discretion in the matter before sentence.

If the advisory Committee on Rules of Criminal Procedure or the Supreme Court had intended to give a defendant the right to withdraw his plea of guilty at any time prior to sentence, they certainly would have used language which more clearly expressed that intent. It would have been a simple matter to have phrased the rule thusly:

> A plea of guilty or of nolo contendere may be withdrawn at any time before sentence is imposed or imposition of sentence is suspended, and to correct manifest injustice the Court, after sentence, may set aside the judgment of conviction and on proper motion permit the defendant to withdraw his plea.

As a matter of fact, Rule 32(d) as promulgated by the Supreme Court is identical with the rule proposed by the Advisory Committee, Rule 34(d) found in the Second Preliminary Draft of Rules of Criminal Procedure.[1] In the note to Rule 34(d) of the

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[1] *Federal Rules of Criminal Procedure, Second Preliminary Draft*, February 1944. U.S. Goverment Printing Office, Washington, D.C.

Second Preliminary Draft of Rules of Criminal Procedure, reference is made to the fact that "Numerous states permit a plea of guilty to be withdrawn and other pleas to be substituted at any time before judgment. See, e.g., Iowa Code (1939) § 13803; Minn. Stat. (1941) § 630.29; Wash. Rev. Stat. Ann. (Remington, 1932) § 2111."

Judge Holtzoff in discussing Rule 32(d) of the new Federal Rules of Criminal Procedure, made the following statement on February 16, 1946: "Under the present rules (Rule 11(4) of the old rules) there is a time limitation on motions to withdraw a plea of guilty. We have substituted the rule that at any time prior to sentence, the Court *at its discretion* may grant such permission, and even after sentence, in extreme cases, it may do so."[2] (Emphasis supplied.)

It is apparent from the foregoing that while Professor Orfield desired that the new rules should grant a defendant the right to withdraw a plea of guilty at any time prior to sentence, his recommendation was neither adopted by the Advisory Committee nor by the Supreme Court. In this connection, it is to be noted that Professor Orfield's statement and query quoted above was made in 1942 before the Advisory Committee had prepared its draft of the new Federal Rules of Criminal Procedure.

On the issue of whether a defendant may withdraw a plea of guilty prior to sentence as a matter of right or whether such a motion is addressed to the sound

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[2]*Federal Rules of Criminal Procedure with Notes and Proceedings*, New York University School of Law, 1946, p. 227.

discretion of the District Court, this is apparently a case of first impression. Other cases arising under Rule 32(d) have uniformly held that a motion to withdraw a plea of guilty filed after sentence is addressed to the Court's discretion. *Taylor v. United States,* 179 F.(2d) 640, certiorari denied 339 U.S. 988, 2nd pet. for rehearing den., 180 F.(2d) 1020 (1950—9 C.A.); *Collins v. United States,* 176 F.(2d) 773, 776, 777 (1949—9 C.A.), certiorari denied 338 U.S. 943; *United States v. Mignogna,* supra; *Stidham v. United States,* 170 F.(2d) 294 (1948—8 C.C.A.); *United States v. Harris,* 160 F.(2d) 507 (1947—2 C.C.A.); *United States v. Searle,* 180 F.(2d) 209 (1950—7 C.A.); *United States v. Lias,* 173 F.(2d) 685 (1949—4 C.A.).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE APPELLANT'S MOTION TO WITHDRAW HIS PLEA.

The courts have reiterated again and again the injunction of the Supreme Court in *Kercheval v. United States,* 274 U.S. 220 (1927) that pleas of guilty are to be accepted only with caution and that a defendant entering such a plea should be permitted to withdraw it if it was made through ignorance, fear or inadvertence. The Appellant has cited numerous cases in which the courts have considered whether a motion to withdraw a guilty plea should be allowed. In support of these motions, the defendants have urged that they were deprived of constitutional rights, *Farnsworth v. Zerbst,* supra; that they lacked

the assistance of counsel, *Cooke v. Swope,* supra; *Jackson v. United States,* 131 F.(2d) 606 (1942—8 C.C.A.); that they had been fraudulently induced to enter a plea of guilty, *Ward v. United States,* supra; *United States v. Fox,* supra; *United States v. Bayaud,* 23 Fed. 721 (1883); that the indictment was insufficient, *Scheff v. United States,* 33 F.(2d) 263 (1929—8 C.C.A.); *Roberto v. United States,* 60 F. (2d) 774 (1932—7 C.C.A.); that he had been misadvised by counsel, did not know what he was doing, and that he was not guilty, *Gleckman v. United States,* 16 F.(2d) 670 (1926—8 C.C.A.). While these are elements which are always to be taken into consideration by a court in determining whether to grant or to deny a motion to withdraw a guilty plea, it will be found that in the vast majority of such cases the motion to withdraw the plea has been denied. This is undoubtedly because the District Courts have been faithful to the Supreme Court's warning and have accepted guilty pleas only with caution in the first place.

In *Bergen v. United States,* supra, the Court, after ruling that the withdrawal of a plea of guilty is within the discretion of the Court and is not a matter of right, laid down the following standards which should be met before a guilty plea is accepted and which, if they have been met, will cause a court to deny a motion to withdraw the plea:

> An intelligent and full understanding by the accused is a first requirement of due process. . . . Circumstances important for consideration are the nature of the charge against the accused,

his apparent intelligence and ability to fully comprehend the charges against him, the gravity of the offense charged, the timeliness of the motion to withdraw the plea (this was under the old rule), and the fact that the accused before entering his plea did not have the advice of counsel.

In this case the Appellant had the advice of counsel and had a full understanding of the charges against him. His claim that he entered the plea under duress and that he did not know what he was doing was considered by the trial judge and was found to be unsupported by the evidence (R. 193).

While the appellant moved the District Court to grant him leave to withdraw his plea of guilty prior to sentence, an examination of the record reveals it was only after he realized that he was not going to receive a lenient sentence, that the Court would probably send him to jail, that he obtained new counsel and moved to withdraw his plea of guilty. The courts have uniformly held that such a discovery on the part of a defendant does not constitute sufficient grounds for the granting of a motion to withdraw a guilty plea. *United States v. Colonna,* supra; *United States v. Norstrand Corporation et al.,* supra, p. 482.

To permit a defendant to wait until he can gauge the severity of the sentence would enable him to trifle with the Court, and the Courts through their discretionary powers in the allowance or disallowance of a motion to withdraw a guilty plea, gain their only protection from such trifling. *United States v. Harris,* supra.

The very least that a defendant should do if he desires to withdraw a plea of guilty is to allege that he is not guilty of the charge to which he pleaded. *United States v. Norstrand Corporation et al.*, supra. In the instant case, the Appellant made divers allegations that he was not familiar with court procedure, that he had been advised by his former counsel to plead guilty and did not know what he was doing, and that later he felt he had made a mistake in pleading guilty. This was after he was advised by the Court he would probably be sent to jail. He further alleged in his motion and testified on the stand that there might be a carry-back from a loss sustained in 1946 which would wipe out the taxes due in 1945 and perhaps part of those due in 1944. His allegations that he did not understand what he was doing, that his counsel had advised him to plead guilty, and other allegations indicating that his plea was not voluntarily and intelligently made were completely rebutted by the testimony of Mr. Hewitt, Mr. Alexander and Mr. Doherty. His allegation that because of a possible carry-back he did not owe any taxes for the year 1945 and for part of 1944 is no defense to the criminal charge and consequently was not material to the Appellant's motion to withdraw his guilty plea. The offense charged in each count of the information is completed on the day the tax return is filed, and subsequent reductions in the taxpayer's liability resulting from the carrying back of a loss do not make his return any the less fraudulent. *Manning v. Seeley Tool and Box Company*, 338 U.S. 561, 565 (1950).

In short, the Appellant did not in his motion to withdraw his guilty plea, or in his testimony from the stand, allege that he was not guilty of the charges contained in the Information, nor did he advance a theory on which a defense to that Information could be premised.

Under these circumstances, and considering the record which reveals clearly that the Appellant understood the nature of the charges and acted intelligently when he entered his plea of guilty, it is submitted that the District Court did not abuse its discretion when it denied the Appellant leave to withdraw his guilty plea.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment and sentence of the trial court should be affirmed.

Dated, Honolulu, T. H.,
December 6, 1950.

Respectfully submitted,

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